

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 11, 2004 Session

**WILLIAM R. VARNER d/b/a FOUNTAIN CITY AUTO SALES v. THE
CITY OF KNOXVILLE, TENNESSEE**

**Appeal from the Circuit Court for Knox County
No. 1-60-01 Dale Workman, Judge**

No. E2003-02650-COA-R3-CV - FILED OCTOBER 14, 2004

This appeal arises from an inverse condemnation suit filed by a landowner against the City of Knoxville. When the landowner purchased the property at issue from a church, it was zoned for residential use and was subject to restrictions set forth in a development plan previously approved by the Knoxville/Knox County Metropolitan Planning Commission. The landowner filed a motion for partial summary judgment which asserted that the City's refusal to remove the property from the development plan precluded use of the property for any economically feasible purpose and, therefore, constituted a taking for which he was entitled to be compensated. The trial court granted the landowner's motion for partial summary judgment and decreed the City liable for a taking. A jury subsequently returned a verdict awarding the landowner damages in the amount of \$125,500.00 which the trial court remitted to \$40,000.00. We conclude that a genuine factual issue exists as to whether there is any economically beneficial use of the property consistent with its current zoning and, therefore, we vacate the judgment of the trial court and remand.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated; Cause
Remanded**

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Sharon E. Boyce, Knoxville, Tennessee, for the Appellant, The City of Knoxville, Tennessee

David Lee Bacon, Knoxville, Tennessee, for the Appellee, William R. Varner

OPINION

The property involved in this appeal consists of a vacant .46 acre lot located at 5531 North Broadway in Knoxville. This lot was part of a 3.2 acre tract (hereinafter "the tract") which was purchased by the Knoxville Primitive Baptist Church (hereinafter "the Church"). At the time of its purchase by the Church the entire tract was zoned as R-1, a residential zoning designation.

In March of 1995, the Knoxville/Knox County Metropolitan Planning Commission (hereinafter “MPC”) approved the Church’s development plan to locate a church on the tract as a use on review under the Zoning Regulations of the City of Knoxville as codified at Article IV of Appendix B in the Knoxville City Code. The approved development plan includes a note with respect to that portion of the tract constituting the .46 acre lot at issue which states “EXISTING GROWTH OF VARIOUS LARGE DECIDUOUS TREES TO REMAIN.”

In October of 1995, the Church requested that the .46 acre lot be re-zoned to C-1 (Neighborhood Commercial District), however, the MPC denied this request.

In June of 1997, the Appellee, William R. Varner, purchased the .46 acre lot from the Church and subsequently filed an application with the MPC to amend the One Year Plan with respect to the lot to change its land use designation from residential to commercial. In this application, Mr. Varner indicated that he proposes to use the lot for expansion of a used automobile business which he operates on adjacent leased property. Although the MPC denied the application on September 11, 1997, on appeal to the Knoxville City Council (hereinafter “the City Council”) Mr. Varner’s requested amendment to the Plan was approved. Thereafter, in January of 1998, Mr. Varner presented a request to the MPC to re-zone the lot to C-4, Highway and Arterial Commercial District, a zoning which allows a used automobile business.

In March of 1998, the City Council, upon reconsideration, withdrew its prior approval of Mr. Varner’s application to amend the One Year Plan; whereupon, Mr. Varner withdrew his re-zoning request previously submitted to the MPC.

In February of 1999, Mr. Varner submitted a request to erect a double-wide manufactured home on the lot; however, this request was refused by the City with the accompanying notation “Approval can not be given at this time until the use on review 3-C-95 UR¹ has been amended by M.P.C. per Doug Berry and Mark Hartsoe with the City Law Dept.”

In March of 1999, the Church requested approval of a revised use on review plan which deleted the .46 acre lot from the 1995 development plan. Although approved by the MPC, this request was subsequently denied by the City Council.

In May of 1999, Mr. Varner once again applied to the MPC to re- zone the lot and amend the One Year Plan from residential to commercial. These applications were denied by the MPC and Mr. Varner appealed to the City Council which also denied the applications on July 11, 2000. Thereupon, Mr. Varner appealed to the Knox County Chancery Court which dismissed Mr. Varner’s complaint upon findings that the City had a rational basis for denying the re-zoning request and that Mr. Varner had not shown by a preponderance of the evidence that he was denied beneficial use of the lot. Upon further appeal to the Court of Appeals, we concluded that the City did not abuse its discretion in denying Mr. Varner’s zoning request. We further determined that Mr. Varner’s assertion on appeal

¹The record shows that this is the file number of the Church use on review.

that the City's decision to deny his re-zoning application deprived him of the beneficial use of the lot constituted a claim that the City had taken his property and that "such a claim is properly pursued by way of a complaint for inverse condemnation." *Varner v. City of Knoxville*, 2001 WL 1560530 (Tenn. Ct. App. 2001). Accordingly, we held that the taking issue was not properly before us and did not address it.

On January 30, 2001², Mr. Varner filed a complaint in the Knox County Circuit Court seeking damages for the inverse condemnation of the subject lot. The complaint names the City as defendant and *inter alia*, provides as follows:

3. Defendant has zoned the property identified as 5531 N. Broadway, Knoxville, Tennessee, as LDR/R-1, the most restrictive residential zoning regulation contained in the ordinances of the City of Knoxville, Tennessee.

....

5. Plaintiff duly applied through the various administrative procedures for relief from the zoning ordinance, but on July 11, 2000, the City Council of the City of Knoxville, Tennessee, by final decree refused to change the zoning from its current state of LDR/R-1.

6. Because of the use of the surrounding property, and the long-established business adjacent to the property, said property is entirely unsuited for use for residential or any other purposes permitted in an LDR/R-1 zone, and has zero market value for such purposes.

7. Because of the refusal of the City Council of the City of Knoxville, Tennessee, to change the zoning of this property, the City of Knoxville, Tennessee has deprived the Plaintiff of any beneficial use whatsoever of his property.

8. Said deprivation of the use of his property constitutes a taking of the Plaintiff's property contrary to the Fifth and Fourteenth Amendments to the United States Constitution, and contrary to the provisions of Article I, Section 21 of the Tennessee State Constitution.

Upon assertion by the City that Mr. Varner had failed to exhaust his administrative remedies by filing a request with the MPC to amend the Church's 1995 plan to delete the subject lot, the Circuit Court entered an order directing Mr. Varner to file such request. In compliance with this order, on June 14, 2002, Mr. Varner filed a request with the MPC to delete the .46 acre lot from the

²This complaint was still pending on November 29, 2001, when we rendered our decision in *Varner v. City of Knoxville*, 2001 WL 1560530 (Tenn. Ct. App. 2001).

development plan; however, this request was denied by the MPC and, on appeal, by the City Council.

On November 6, 2002, Mr. Varner filed a motion for partial summary judgment asserting that the City is liable for taking his property. This motion was granted by order of the Circuit Court entered January 15, 2003, and damages were subsequently set by a jury at \$125,500.00, although the Circuit Court later reduced this amount to \$40,000.00. Thereafter, the City filed the instant appeal.

The following three issues are raised in this appeal:

1) Whether the Circuit Court erred in granting Mr. Varner's motion for partial summary judgment on grounds that the City has deprived Mr. Varner of all economically beneficial use of the subject lot.

2) Whether the Circuit Court erred in remitting the jury verdict awarding damages in the amount of \$125,500.00 to \$40,000.00.

3) Whether the Circuit Court erred in denying Mr. Varner's motion for discretionary costs, expenses, and disbursements.

The first issue we address is whether the Circuit Court erred in granting Mr. Varner's motion for partial summary judgment which asserts that the City is liable for a taking upon grounds that the City denied Mr. Varner all economically beneficial use of the property in question.

Summary judgment proceedings are efficient and effective vehicles for concluding cases that can and should be decided on legal issues alone. However, these proceedings should not serve as a substitute for a trial of genuine and material factual matters. *Byrd v. Hall*, 847 S.W.2d 208, 210-211 (Tenn. 1997); *Bellamy v. Federal Express Corp.*, 749 S.W.2d 31, 33 (Tenn. 1988). Summary judgments should be awarded only when the moving party has demonstrated that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Tenn. R.Civ.P. 56.04; *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997); *Carvell v. Bottoms*, 900 S.W. 2d 23, 26 (Tenn. 1995).

No presumption of correctness attaches to the lower court's judgment and our task is confined to reviewing the record to determine whether the requirements of Tenn. R. Civ. P. 56 have been met. We must view the evidence in the light most favorable to the nonmoving party, which in this case is the City, and must draw all reasonable inferences in favor of the nonmoving party. *Staples v. CBL & Associates, Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000).

The Fifth Amendment to the United States Constitution requires that the federal government shall compensate one whose property is taken for use of the public and the Fourteenth Amendment makes this requirement applicable to state governments.

A taking may be found to exist not only when the government actually takes possession of property but also when a regulation is promulgated which results in a sufficient extent of diminution to property. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). A property owner is not prohibited from raising a regulatory taking claim even though the regulation complained of predates such property owner's acquisition of the regulated property, as occurred in the matter *sub judice*. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

Frequently, in order to determine whether a taking has occurred, the court must engage in an *ad hoc* factual inquiry with primary focus upon three factors - the economic impact of the regulation, the character of the government action and the regulation's interference with reasonable investment backed expectations. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978) and *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). However, as the United States Supreme Court recognized in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), two categories of regulatory action do not require an *ad hoc* factual inquiry before compensation will be allowed:

The first [of these categories] encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. ...

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. (Emphasis added.)

Based upon the record before us, it is not possible to determine the precise grounds upon which the Circuit Court concluded that this was a proper case for partial summary judgment. The Circuit Court's order merely grants Mr. Varner's motion, finds the City liable for a taking of Mr. Varner's property and sets a date for the jury to determine the amount of damages. Mr. Varner's motion for partial summary judgment recites in pertinent part that the City has placed the property in question in a development plan that requires that the property "remain, in perpetuity, a buffer" between highly developed commercial property and the Church's property which is zoned for residential use. The motion further recites that on June 14, 2002, Mr. Varner complied with the Circuit Court's order that he file a request with the MPC to have the property removed from the 1995 development plan and that, although the MPC approved the request, the request was, thereafter, denied by City Council. The motion asserts that Mr. Varner "has now completely exhausted his administrative remedies, but is still precluded from any use at all of his property" and that the City "has thus taken [his] property for use of the common good of the people." The motion finally asserts that, under *Lucas*, "the regulatory taking of property which precludes its use for any economically feasible purpose is also a taking under the United States Constitution."

In support of his argument for affirmation of the Circuit Court's summary judgment, Mr. Varner asserts that the City engaged in a taking under the facts in this case because the City indicated

by its actions that it “intends for this property to remain vacant in perpetuity” and that by this requirement the City “deprives [him] of any economically feasible use of the property.” The actions of the City to which Mr. Varner makes reference are the City’s refusal to change the zoning of the property from residential to commercial and its refusal to delete the lot from the Church’s development plan approved in 1995. Mr. Varner also references the City’s denial of his application to install a double-wide manufactured home on the lot in 1999 which, he maintains, was a permitted use of the lot under the residential zoning. Mr. Varner argues that the City’s refusal to allow commercial use of the property coupled with its refusal to allow the lot to be used for a purpose in conformity with its residential zoning indicate that the City does not intend for the lot to be used for any purpose whatsoever. Mr. Varner argues that under these conditions the lot is effectively being pressed into public service as a buffer between adjacent residential and commercial property and this constitutes a taking for which he should be compensated. As in his motion for partial summary judgment, Mr. Varner relies upon *Lucas* as authority for his argument that he has suffered a taking in this case and articulates the issue on appeal as being, “Does the fact that the City of Knoxville has restricted the use of property to the extent that it cannot be used for any economic purpose constitute a taking of the property from its owner?”

The acreage at issue, as we have noted, is zoned as an R-1 residential district. The City has asserted that the denial of commercial zoning was not a taking and that Mr. Varner has beneficial use of his property for residential uses. Article IV, §2 of the Knoxville City Code provides that the following are permitted uses under R-1 zoning:

B. Permitted principal and accessory uses and structures. Property and buildings in an R-1 single-family residential district shall be used only for the following purposes:

1. Detached single-family dwellings, but not including trailer houses or mobile homes.
2. Utility substations, easements, alleys and rights-of way, and transportation easements, alleys and rights of way.
3. Accessory uses, subject to the provisions of article 5, section 4.
4. Accessory buildings and structures, subject to the provisions of article 5, section 4. ...
5. Signs, as regulated in article V, section 10.
6. Agricultural crops, but not the raising of farm animals or poultry.

As Mr. Varner notes, we have hitherto acknowledged that under Tennessee law a city ordinance may not exclude a double-wide manufactured home from property zoned residential. *Tennessee Manufactured Housing Association v. Metropolitan Government of Nashville*, 798 S.W.2d 254 (Tenn. Ct. App. 1990). Based upon the City’s denial of his request to locate a double-wide manufactured home on the subject property, a use consistent with R-1 zoning, Mr. Varner concludes that the City will not allow any economically feasible use of the property. We do not agree that this conclusion follows based upon the available record.

The only proof before us showing why the City rejected Mr. Varner's request to locate the manufactured home on his property is a notation which states "Approval can not be given at this time until the use on review 3-C-95 UR has been amended by M.P.C. per Doug Berry and Mark Hartsoe with the City Law Dept." As Mr. Varner points out, this notation is "rather cryptic" and the grounds for the City's refusal of Mr. Varner's application are not precisely clear. However, even though the City denied Mr. Varner one permitted use under R-1 zoning, it does not follow that the City would disallow all of the uses allowed under Article IV, §2.

Despite the restrictions placed upon the property by the development plan and R-1 zoning, remaining uses which might be permitted by the City include for example, use of the property for sign placement or for the location of agricultural crops. As previously noted, we are required to view all evidence in favor of the City and draw all reasonable inferences in favor of the City. Given this standard, we must conclude that a genuine factual issue remains as to whether the City would allow any economically beneficial use of the property consistent with its current zoning, and accordingly, it is our determination that the Circuit Court erred in granting Mr. Varner's motion for summary judgment.

Given our decision as to the first issue addressed herein, we find that it is not necessary that we address the two additional issues presented for our review.

For the foregoing reasons the judgment of the Circuit Court granting the motion for partial summary judgment is vacated and the cause is remanded for trial on the merits. Costs of appeal are adjudged against William R. Varner.

SHARON G. LEE, JUDGE